Wong Cheong Kai & Ors v Hongkong Bank (M) Bhd & Anor

HIGH COURT (IPOH) — CIVIL SUITS NO 22–58 OF 1992 AND 22–86 OF 1992
JAMES FOONG J
13 MARCH 2000

Land Law *— Sale of land — Order for — Appointment of person to conduct sale — Whether senior assistant registrar has authority to appoint chargee's lawyer to carry out sale — Whether appointment was null, void and of no effect — Whether protection under s 14(2) of Courts of Judicature Act 1965 apply*

Land Law *— Sale of land — Order for — Duty of care to chargor — Chargee to take reasonable care to obtain true market value of property at time of sale — Change in manner of payment of 10% deposit — Extention of time to pay balance of purchase price granted without prior consent from chargor — Whether breach of duty of care to chargor*

The plaintiffs were the registered owners of a property which was charged to the first defendant bank. Upon the failure to repay the loan, the first defendant commenced foreclosure proceedings on the property. The High Court granted to the first defendant an order to sell the property by way of public auction. Acting for the first defendant as advocate and solicitor in securing the order for sale was the second defendant. Pursuant to this order, the senior assistant registrar ('the SAR') directed, inter alia, that the second defendant do have the conduct of the sale. The property was sold to a purchaser at the reserved price and was subjected to certain conditions of sale. The plaintiff claimed against the defendants for negligence in carrying out the order for sale of the property by wilfully neglecting the conditions of sale by: (i) having accepted payment of 10% deposit from the purchaser in the form of a personal cheque; (ii) failed to notify the plaintiffs before applying for and obtaining two extensions of time for the purchaser to complete the sale; (iii) received only RM868,520 of the purchase price instead of the full sum of RM1,020,100 when applying for the certificate of sale from the SAR; and (iv) failed to collect the difference in the balance of the purchase price amounting to a sum of RM157,519.

Held:

(1) The first defendant as the chargee owed a duty to the plaintiffs as the chargor to take reasonable care to obtain the true market value of the property at the date of the sale (see p 426E–H).

(2) The act of the SAR in appointing the second defendant to have conduct of the sale was ultra vires. The National Land Code 1965 does not prescribe such authority to the SAR to make such appointment. The SAR had exceeded her jurisdiction. By this, the appointment of the second defendant to carry out the sale must

be null and void and of no effect. As such, the second defendant could not be considered as an officer of the court or other person bound to execute the order of the court, in order to be entitled for protection under s 14(2) of the Courts of Judicature Act 1965 (see pp 427H–428A).

(3) The change in the manner of payment of the 10% deposit did not affect the true market value of the property at the material time of sale. Therefore the first defendant had not breached its duty of care to the plaintiffs (see p 428D–F).

(4) The court found no evidence of the second defendant having acted outside its scope of duty of care to the plaintiffs to personally assume a duty of care to the plaintiffs. The second defendant was therefore not liable in this instance to the plaintiffs (see p 428F).

(5) Any extension of time to pay the balance of the purchase price from the originally agreed will have an effect on the true market value of the property sold. Though the first defendant possessed no power to approve the extensions but its acts in consenting to the applications for extensions of time and by not obtaining the prior consent from the plaintiffs when consenting, it had committed a breach in its duty of care to the plaintiffs in not securing the true market value of the property at the time of sale. The contention related to the practice in applying for extensions has no relevance to the duty of care to obtain the true market value of the property at the time of sale (see pp 429H–430A).

(6) The act of the first defendant in making a deal with the purchaser to set off the sum of RM151,519 from the balance of the purchase price had affected the true market value of the property. Therefore the first defendant had breached its duty of care to the plaintiffs. The plaintiffs were entitled to the sum not collected from the purchaser (see pp 430H–431A, 428E).

(7) The plaintiff could not on the one hand accept the agreement of sale of the property as subsisting and then simultaneously insist on being paid damages for termination of the contract due to the purchaser's breach. A claim for this can only arise when the agreement for sale was terminated. With the contract of sale subsisting, there was no justification to award the loss of RM102,010 allegedly caused by the failure of the first defendant to forfeit the 10% deposit (see p 432A–C).

[Bahasa Malaysia summary

Plaintif-plaintif adalah tuan punya-tuan punya berdaftar suatu hartanah yang telah digadaikan kepada bank defendan pertama. Di atas kegagalan untuk membayar balik pinjaman tersebut, defendan pertama telah memulakan prosiding-prosiding penutupan di atas hartanah tersebut. Mahkamah Tinggi memberikan kepada defendan

pertama suatu perintah untuk menjual hartanah tersebut melalui lelong awam. Mewakili defendan pertama sebagai peguambela dan peguamcara untuk menjamin perintah jualan tersebut adalah defendan kedua. Menurut perintah ini, penolong kanan pendaftar ('PKP') telah mengarahkan, antara lain, bahawa defendan kedua dibenarkan mengurus jualan tersebut. Hartanah tersebut telah dijual kepada pembeli pada harga simpanan dan tertakluk kepada beberapa syarat penjualan. Plaintif menuntut terhadap defendan-defendan untuk kecuaian di dalam melaksanakan perintah jualan hartanah tersebut kerana dengan sengaja mengabaikan syarat-syarat penjualan tersebut dengan: (i) telah menerima pembayaran 10% deposit daripada pembeli di dalam bentuk cek peribadi; (ii) gagal untuk memberitahu plaintif-plaintif sebelum memohon untuk dan memperoleh dua lanjutan masa bagi pembeli untuk menyempurnakan penjualan tersebut; (iii) hanya menerima RM 868,520 daripada harga belian dan bukannya jumlah penuh sebanyak RM1,020,100 semasa memohon untuk sijil jualan daripada PKP; dan (iv) gagal untuk mendapatkan perbezaan baki harga belian yang terjumlah sebanyak RM159,519.

Diputuskan:

(1) Defendan pertama sebagai pemegang gadaian mempunyai tugas kepada plaintif-plaintif sebagai pemberi gadaian untuk mengambil tindakan yang berhati-hati secara munasabah untuk memperoleh nilai pasaran sebenar hartanah pada tarikh jualan tersebut (lihat ms 426E–H).

(2) Tindakan PKP di dalam melantik defendan kedua untuk menguruskan jualan tersebut adalah ultra vires. Kanun Tanah Negara 1965 tidak memperuntukkan kuasa sedemikian kepada PKP untuk membuat perlantikan sedemikian. PKP tersebut telah melampaui bidang kuasanya. Dengan itu, perlantikan defendan kedua untuk melaksanakan jualan tersebut adalah batal dan tak sah dan tiada kesan. Dengan itu, defendan kedua tidak boleh dianggap sebagai pegawai mahkamah, untuk berhak kepada perlindungan di bawah s 14(2) Akta Mahkamah Kehakiman 1965 (lihat ms 427H–428A).

(3) Perubahan di dalam cara pembayaran 10% deposit tidak menjejaskan nilai pasaran sebenar hartanah tersebut pada masa matan penjualan tersebut. Oleh itu, defendan pertama tidak melanggar tugas berhati-hati kepada plaintif-plaintif (lihat ms 428D–E).

(4) Mahkamah mendapati tiada keterangan bahawa defendan kedua telah bertindak di luar skop tugas berhati-hati kepada plaintif-plaintif untuk mengenakan secara peribadi suatu tugas berhati-hati kepada plaintif-plaintif. Dengan itu, defendan kedua tidak bertanggungan di dalam keadaan ini kepada plaintif-plaintif (lihat ms 428F).

(5) Sebarang perlanjutan masa untuk membayar baki harga belian daripada yang dipersetujui pada asalnya mempunyai kesan ke atas nilai pasaran sebenar hartanah yang dijual. Walaupun defendan pertama tidak memiliki kuasa untuk meluluskan perlanjutan tersebut tetapi tindakan-tindakannya di dalam membenarkan permohonan tersebut untuk perlanjutan masa dan dengan tidak memperoleh persetujuan terdahulu daripada plaintif-plaintif semasa memberikan persetujuan, ia telah melakukan suatu pelanggaran di dalam tugas berhati-hatinya kepada plaintif-plaintif di dalam tidak mendapatkan nilai pasaran sebenar hartanah tersebut pada masa penjualan. Penegasan berkaitan kepada amalan memohon perlanjutan tiada kaitan kepada tugas berhati-hati untuk memperoleh nilai pasaran sebenar hartanah tersebut pada masa jualan (lihat ms 429H–430A).

(6) Tindakan defendan pertama di dalam membuat perjanjian dengan pembeli untuk menolak jumlah RM151,519 daripada baki harga belian telah menjejaskan nilai pasaran sebenar harta tanah tersebut. Oleh itu defendan pertama telah melanggar tugas berhati-hatinya kepada plaintif-plaintif. Plaintif-plaintif berhak kepada jumlah tersebut yang tidak dikutip daripada pembeli (lihat ms 430H–431A, 428E).

(7) Plaintif tidak boleh pada masa yang sama menerima perjanjian penjualan hartanah tersebut sebagai berterusan dan pada masa yang sama menegaskan untuk dibayar ganti rugi untuk penamatan kontrak oleh kerana pelangggaran pembeli. Tuntutan ini hanya boleh berbangkit apabila perjanjian jualan ditamatkan. Dengan kontrak jualan masih berterusan, tidak terdapat justifikasi untuk mengawardkan kerugian RM102,010 yang dikatakan diakibatkan oleh kegagalan defendan pertama untuk merampas 10% deposit (lihat ms 432A–C).]

Notes

For cases on order for sale of land, see 8 *Mallal's Digest* (4th Ed, 1999 Reissue) paras 3030–3101.

Cases referred to

Al-Kandari v JR Brown & Co [1988] 1 All ER 833 (refd)

Asia Commercial Finance (M) Bhd & Anor v Development & Realtor Sdn Bhd [1992] 2 MLJ 504 (refd)

Bell v Strathairn & Blair (1954) 104 LJ 618 (refd)

Cuckmere Brick Co Ltd v Mutual Finance Ltd [1971] Ch 949 (refd)

Development & Commercial Bank, Johore Baru v Kim Ming Choon [1991] 2 MLJ 246 (refd)

Gran Gelato Ltd v Richcliff (Group) Ltd [1992] 1 All ER 865 (refd)

M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor [1994] 1 MLJ 294 (refd)

Malayan United Finance Bhd, Johore Baru v Liew Yet Lan [1990] 1 MLJ 317 (refd)

Legislation referred to

Courts of Judicature Act 1965 s 14(2)
National Land Code 1965 ss 256(1), 259, 268(1)(a)

Lim Boon Seng (*Lim Boon Seng*) for the plaintiffs.

Chan Chong Choon (*Lim Konn Huan* with him) (*Skrine & Co*) for the first defendant.

V Vijaya Segaran (*James Devadason* with him) (*Maxwell, Kenion, Cowdy & Jones*) for the second defendant.

James Foong J:

Introduction

The plaintiffs' claim in both cases against the defendants is for negligence in carrying out an order for sale of their three properties in the town of Ipoh ('the said property').

Background

The plaintiffs jointly were the registered owners of the said property. It was charged to the first defendant, a bank, by way of a third party charge for financial facilities granted to a company known as Thong Woh Sawmill & Timber Merchant Sdn Bhd ('the company'). The company was unable to repay the loans due to the first defendant, therefore resulting in a foreclosure proceeding instituted by the first defendant on the said property.

On 24 July 1987, the High Court at Ipoh granted to the first defendant an order to sell the said property (order for sale) by way of public auction. Acting for the first defendant as advocate and solicitor in securing this order for sale was the second defendant. Pursuant to this order, the senior assistant registrar ('the SAR') on 4 April 1988 directed, inter all a that:

(1) The said property be sold under the direction of the court and the National Land Code 1965 ('the NLC') for the recovery of monies due to the first defendant amounting to RM694,169.18 as at 24 July 1987 together with interest of 10.75% pa from date of judgment to date of satisfaction.

(2) M/s Colliers Jordan Lee & Jaafar Sdn Bhd to be the auctioneer.

(3) The reserve price be RM1,020,000.

(4) The conditions of sale applicable should be that as contained in a document marked as 'B'.

(5) The second defendant do have the conduct of the sale.

On 25 March 1989, the said property was sold to one Tan Kin Tong @ Tan Kean Hoe ('the purchaser') for RM1,020,100. This was witnessed by a memorandum of sale executed by the first defendant with the purchaser. Attached to this memorandum of sale and forming a part thereto were the conditions of sale. Upon this purchase, the plaintiffs claim that the

purchaser paid to the second defendant his personal cheque for a sum of RM102,010, which forms 10% of the purchase price.

In the conditions of sale, relevant to the purpose of this case, the following were specified:

> Condition 5 required the payment of 10% deposit to be made to the second defendant in the form of 'cash/banker's cheque or bank draft'.
>
> Condition 6 required the purchaser to 'be liable to pay any arrears of quit rent and assessment which may be due in respect of the said property.
>
> Condition 8 stated that the said property was sold 'subject to all existing tenancies if any, and all claims of tenants and occupiers by contract, customs, statute or otherwise'.
>
> Condition 11 required the balance of the purchase price to be paid by the purchaser to the second defendant within 90 days from date of the sale or within seven days from date of receipt of notice from the vendor's solicitors that possession of the said property can be delivered, which ever was the earlier date, and that this provision was of the essence of the contract.
>
> Condition 12 stated that in the event of the purchaser defaulting in payment of the balance of the purchase price the said property should be put up again for sale, and the deposit would be forfeited and used to defray and expenses incurred in the resale of the said property and 'the deficiency in price (if any) which may result on a resale or the balance of the purchase price if there is no resale shall be recoverable from the defaulting purchaser, as the case may be'.
>
> Condition 17 provided that upon the payment of the balance of the purchase price the second defendant should prepare a certificate of sale in accordance with s 259 of the NLC for execution by the SAR.

Plaintiffs' claim

The plaintiffs now complain that the defendants have wilfully neglected the conditions of sale by:

(1) having accepted payment of 10% deposit from the purchaser in the form of a personal cheque;

(2) failed to notify the plaintiffs before applying for and obtaining the two extensions of time for the purchaser to complete the sale;

(3) received only RM868,520 of the purchase price instead of the full sum of RM1,020,100 when applying for the certificate of sale from the SAR; and

(4) failed to collect the difference in the balance of the purchase price amounting to a sum of RM157,519.

For this, in suit GS 22–58–1992 the plaintiffs are claiming liquidated damages of RM386,631.80 which is made up of:

(1) Loss of RM102,010 (the 10% deposit) with interest thereon at 10% pa from 25 March 1989 to 29 February 1992 due to the failure of the defendants in forfeiting the 10% deposit.

(2) Loss on the interest on the sum of RM918,090 (the balance of the purchase price) at the rate of 10% pa from 24 June 1989 to 8 July 1989 caused by the extension of time given to the purchaser to pay the balance of the purchase price.

(3) Loss of a sum of RM157,510.41 which the second defendant did not collect from the purchaser and interest due to this amount from 8 July 1989 to 29 February 1992 at the rate of 11% pa.

(4) Loss of additional interest the plaintiffs had to pay to the first defendant from 25 March 1989 to 15 July 1989 (the period between the date of the sale of the said property and the completion date) which amounted to RM25,003.35.

(5) Interest the plaintiffs had to pay to another bank, Public Bank Bhd, for facilities granted to the plaintiffs/when the said property was foreclosed.

In GS 22–86–1995 the plaintiff is the administrator of the estate of a deceased who was a co-owner of the said property with the plaintiffs in the case GS 22–58–1992. Since there was a delay in obtaining Letters of Administration for this estate, this suit was filed subsequent to GS 22–58–1992. Both these suits were consolidated. For this case GS 22–86–1995, the plaintiff claims:

(1) balance of the proceeds of sale;

(2) damages;

(3) interest and cost.

First defendant's defence in both suits

The first defendant denies that it owes a duty of care to the plaintiffs. It insists that its duty in respect of this judicial sale was to take reasonable care to obtain a true market value of the property at the time of sale and to deliver the document of title to the purchaser upon the purchaser completing the sale, and on this duty there was no breach. Other than this, it owed no other duty of care to the plaintiffs after the fall of the hammer at the auction. Further, the first defendant explains that the conduct of the sale was in the hands of the court. Though the second defendant was its solicitor, the court had ordered the second defendant to take charge of the sale. By this, the second defendant was no longer its agent; the second defendant became an agent of the court.

On the plaintiffs' claim for damages, the first defendant denies that the plaintiffs are entitled to this.

Second defendant's defence in both suits

The second defendant's defence is that it owes no duty of care to the plaintiffs, and even if it did, it had not breached this duty of care for its actions in the conduct of this sale must be judged and evaluated in the light of practice existing then, not currently. In any event, the second defendant insists that all its acts and/or omissions in respect of this sale were protected under s 14 of the Court of Judicature Act 1965 ('the CJA'). In respect of damages claimed by the plaintiffs, the second defendant denies that the plaintiffs have suffered any loss, and that their claim is speculative in nature.

Issues

By the nature of the pleadings I find that the following are the issues for consideration:

(1) Whether the defendants owed to the plaintiffs a duty of care?

(2) If so, was there a breach of this duty of care by the defendants?

(3) And if there was a breach of this duty of care, whether the second defendant is protected under s 14 of the CJA?

(4) If there is no protection accorded under s 14 of the CJA, then whether the damages claimed by the plaintiffs is sustainable?

Analysis

Is there a duty of care?

Between the plaintiffs and the first defendant, I do not think there is any dispute on the principle that a chargee of a charged property owes a duty of care to the chargor when the charged property is foreclosed. This I believe is based on the respected decision of Edgar Joseph Jr J (as he then was) in *Asia Commercial Finance (M) Bhd & Anor v Development & Realtor Sdn Bhd* [1992] 2 MLJ 504. There the learned judge scouted relevant authorities and arrived at the conclusion that such duty of care existed where the charged property was sold by way of a judicial sale under the National Land Code. The rationale for this stemmed from the proximity of a mortgagor and a mortgagee. As to the scope of this duty, the authority accepted the ratio expressed by Salmon LJ in *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 as (at p 966):

> to take reasonable care to obtain what I call the true market value at the date of the sale ... .

Having determined the legal obligation of the first defendant to the plaintiff, I shall now proceed to discuss whether any duty of care was owed by the second defendant personally to the plaintiff.

I do not think that the first defendant can challenge the contention of the plaintiffs that it is responsible for the acts and/or omissions of the second defendant in the conduct of this sale based on the principle of vicarious liability of a master to its servant and/or agent. But the issue here goes

further. The plaintiffs assert that the second defendant is personally liable to them.

The authorities of *Gran Gelato Ltd v Richcliff (Group) Ltd* [1992] 1 All ER 865 and *Al-Kandari v JR Brown & Co* [1988] 1 All ER 833, establish that if a solicitor acting, for this client steps outside the role of its duty as solicitor for his client and accepts a direct responsibility towards a third party, then the solicitor has created an independent duty of care to the third party and shall be personally liable to the third party when he breached such duty of care. What scope this duty involves will naturally depend on the character of the responsibility which the solicitor gave to the plaintiff. These propositions I find are rational for adoption in the application of this case. Thus before I can decide on whether the second defendant is personally liable to the plaintiffs, each of the alleged incidents of breach must be examined.

Second defendant appointed by the court

Before even proceeding to examine each of the alleged incidents of negligence against both the defendants there is a necessity to settle one pertinent issue. This is the contention of the first defendant that the second defendant was not its agent and/or servant in the conduct of this entire sale. The first defendant insists that the second defendant was a servant and/or agent of the court by virtue of the fact that the second defendant was appointed by the SAR to carry out this task; the second defendant has become an officer of the court. Therefore when the second defendant was not its servant and/or agent in the conduct of this sale, the first defendant claims that it should not be made responsible for any negligent act of the second defendant. Riding on this contention, the second defendant argues that if the court does find the second defendant personally liable for negligence, the second defendant cannot be held liable due to s 14(2) of the CJA which states:

> No officer of any court or other person bound to execute the lawful warrants or orders of any judge or other person acting judicially shall be liable to be sued in any civil court for the execution of any warrant or order which he would be bound to execute if within the jurisdiction of the person issuing the same.

Under s 256(1) of the NLC, the judicial sale of the said property must be under the direction of the court. In the execution of this exercise, the NLC permits the court to appoint a licensed auctioneer to assist in this assignment. There is however no provision under the NLC for the appointment of any other person or persons to assist, lest the chargee solicitor, in the conduct of such sale. I believe the rationale against such appointment must be to maintain the court's neutrality towards such sale. But unfortunately in this case, the SAR had proceeded to appoint the second defendant to have conduct of the sale. Such act of the SAR, in my opinion, is ultra vires, for the NLC does not prescribe such authority to the SAR to make such appointment. The SAR had exceeded her jurisdiction. By this, the appointment of the second defendant to carry out this sale must

be null and void and of no effect. When this is the position, the second defendant cannot be considered as an officer of the court or other person bound to execute the order of the court, in order to be entitled for protection under s 14(2) of the CJA.

Now I shall proceed to examine each of the incidents of alleged breach.

Acceptance of a personal cheque

The first relates to the acceptance by the second defendant of a personal cheque from the purchaser for the payment of the 10% deposit. Undoubtedly this was a breach of condition 5 of the conditions of sale where it specifies that such deposit must be made by way of cash or banker's order. This may be breach of contract, but the question in issue is not related to contract but in the tort of negligence. A breach of contract may not necessarily amount to a breach of a duty of care. The duty of care owed by the first defendant, as expressed earlier, was: to ensure that the true market value of the said property was obtained at the time of sale. Thus the question that must be answered is: whether this change in the manner of payment of the 10% deposit affected the true market value of the property at the material time of sale.

My view is that it did not. The purchase price was still the same, ie it was the true market value at the material time whether the payment of the 10% deposit was made in the manner as prescribed in the memorandum of sale or in the form of a personal cheque of the purchaser. This altered form of payment made no difference to the true market price of the property at the material time. By this I find the first defendant has not breached its duty of care to the plaintiffs in this particular instance.

As to the question of whether the second defendant is personally liable to the plaintiffs for this incident, I find no evidence of the second defendant having acted outside its scope of duty of care to the plaintiffs to personally assume a duty of care to the plaintiffs. The second defendant is therefore not liable in this instance to the plaintiffs.

Extension of time to pay the balance of the purchase price

The second allegation of breach centres on the two applications to the SAR for extension of time for the purchaser to pay the balance of the purchase price.

The completion date, according to the conditions of sale was 90 days from date of sale. This would be 25 June 1989. On 22 June 1989, two days before the date set for completion the second defendant wrote a letter to the SAR, requesting on behalf of the purchaser an extension of a week to complete the purchase due to some delay in the preparation of security documents for a loan which the purchaser intended to obtain to assist him in paying off the balance of the purchase price. The second defendant then expressed that the first defendant who was their client had no objection to this request of the purchaser. Without notifying the plaintiffs of this application the SAR granted this application. She approved this by writing

on the side of the paragraph of the letter requesting for extension the word: 'OK', and initialled beneath it. Unable to meet the dateline of the extended period the second defendant once again wrote to the SAR on 30 June 1989. The contents of this second letter is almost similar to the first except that it requested for another week's extension for the purchaser to complete the sale. Once again the second defendant said in this letter that the first defendant had no objection. Again this was approved by the SAR in similar fashion as the first. This second application and both approvals by the SAR were not brought to the attention of the plaintiffs.

Undoubtedly what was done was totally incorrect. Firstly, this application was not made in the mode and manner as set out in the RHC. Secondly, the purchaser, not being a party to the foreclosure proceeding, had not applied to intervene in this proceeding to entitle him locus to be an applicant in the proceeding. Thirdly, and most fundamentally of all, the plaintiffs as chargees, were never notified and given an opportunity to be heard in these applications. They were not even informed of the approvals granted. They were entirely ignored.

Such acts of the SAR had been ruled ultra vires — see the cases of *Malayan United Finance Bhd, Johore Baru v Liew Yet Lan* [1990] 1 MLJ 317, *Development & Commercial Bank, Johore Baru v Kim Ming Choon* [1991] 2 MLJ 246 and *M & J Frozen Food Sdn Bhd & Anor v Siland Sdn Bhd & Anor* [1994] 1 MLJ 294. This entitles the plaintiffs to set aside the sale of the said property. But the plaintiffs do not wish this. They prefer to charge the defendants for negligence.

Before considering the issue of negligence of the defendants the role of the second defendant in this incident must be identified and established, ie did the second defendant act independently other than as solicitors for the first defendant to create a personal duty of care to the plaintiffs? My view is that it has not. This can be revealed from the second defendant's letters to the SAR applying for extension of time. Here the second defendant explicitly announced that it was acting for the first defendant and that, its client, the first defendant, had no objection to the applications. Such disclosure is sufficient to warrant my finding of the second defendant to be a servant and/or agent of the first defendant, and that it had not personally assumed any independent duty of care to the plaintiffs in this incident.

As to the position of the first defendant, I must constantly be reminded that the scope of its duty of care to the plaintiffs was to secure the true market value of the said property at the time of sale. Towards this incident, the same question must be raised. Did the first defendant by its action on this occasion obtain the true market value of the said property at the time of sale? Undoubtedly any extension of time to pay the balance of the purchase price from that originally agreed will have an effect on the true market value of the property sold. This is for reason that landed property does not remain static. It fluctuates with time. Thus time of payment of the purchase price in any landed property is an important factor in the determination of the purchase price. In this case the true value of the said property at the time of sale must certainly be affected by the two extensions of time granted by

the SAR. Though the first defendant possessed no power to approve these extensions but by its acts in consenting to the applications for extension of time and by not obtaining the prior consent from the plaintiffs when consenting, it has committed a breach in its duty of care to the plaintiffs in not securing the true market value of the said property at the time of sale.

The defendants had raised a contention that since this is a case of negligence the acts of the second defendant, a servant and/or agent of the first defendant, must be judged on the basis of what a reasonably competent solicitor would have done at that material time. As a reminder, a passage from the case of *Bell v Strathairn & Blair* (1954) 104 LJ 618 was cited. It says:

> In determining whether the solicitor has exercised reasonable skill and care, he should be judged in the light of the circumstances at the time.

The defendants then called witnesses to testify that it was the practice in Ipoh at the material time for solicitors of a chargee to apply for extension of time on behalf of the purchaser to pay the balance of the purchase price in a judicial sale in the manner as was done in this case. Thus, going by the phrase coined by the learned authors of *Jackson & Powell on Professional Negligence* (4th Ed) at p 450:

> His (the defendants) action or advice may, with the benefit of hindsight is no touchstone of negligence.

The issue before this court is not on what was the practice of the solicitors at that material time in carrying out their duties for the clients. It is: whether the first defendant has breached its duty of care to the plaintiffs in not obtaining the true market value of the property at the time of sale. This duty, as I have found by the reasons elaborated above has been breached in this incident. This contention which relates to the practice in applying for extension has no relevance to the duty of care to obtain the true market value of the said property at the time of sale. It might be of good defence in a suit brought by a chargor against his former solicitor for negligence, but not in these particular circumstances.

Not receiving the balance of the purchase price

The purchase price of the said property in the memorandum of sale was RM1,020,100. After the fall of the hammer, the purchaser paid 10% of the purchase price amounting to RM102,010. The balance left was RM918,090. This was to be paid within 90 days from date of sale. On 8 July 1989, the purchaser and his financier paid to the second defendant a sum of RM868,580.90. There was a shortfall of RM151,519. This sum was never received by either defendants. What happened was that the second defendant, acting for and on behalf of the first defendant, had made a deal with the purchaser to set-off this sum of RM151,519 from the balance of the purchase price on the understanding that the purchaser would pay the outstanding quit rent and assessment then due on the said property which amounted to RM190,742.16. This arrangement, apparently, was also part

of the consideration for the first defendant to agree to the purchaser's application to extend the completion date.

This explanation is strongly opposed by the plaintiffs. They claim that under condition 8 of the condition of sale 'the purchaser shall be liable to pay for the arrears of quit rent and assessment which may be due in respect of the said property'. So this sum of RM151,519 should have been collected from the purchaser before the defendants applied to the SAR for the issuance of the certificate of sale (Form 16F) under the NLC. By the defendants' failure to comply with the above the defendants had committed a breach of its duty of care to them.

The defendants replied by pointing out s 268(1)(a) of the NLC which specifies that:

> The purchase money arising on any sale under this Chapter shall be applied as follows — firstly, in payment of rent to the State Authority ... and other outgoings payable to the State Authority or any local authority;

By this, the defendants are of the view that such set-off was justified since the plaintiffs would still be liable to pay for these outgoings — ultimately. In addition, the second defendant informs this court that these outgoings were more than the sum set-off. It was RM190,742.16 and even with the deduction of RM151,580 the purchaser had to pay out of his own pocket an additional sum of RM49,509.10 to the authorities before the registration for the transfer of the said property could be effected.

In respect of this episode I find that the second defendant was acting as solicitor for the first defendant. All sums received and the amount agreed to be set-off were done with the consent and under the instructions of the first defendant. Similar to other alleged incidents, I find no evidence to support the contention that the second defendant had stepped outside the scope of this duty as solicitor for the first defendant to establish a direct duty of care with the plaintiffs. The second defendant is therefore not liable to the plaintiffs.

Though I may agree that ultimately the plaintiffs would have to pay for such outgoings but this would only come about after the proceeds of sale was received. Section 268(1)(a) of the NLC is very specific when it imposes such obligation to pay. It is only from the proceeds of sale. So unless the proceeds of sale, which was the full purchase price, was received there was no duty on the part of the plaintiffs to pay. In this case, the purchaser had by contract agreed to pay for such outgoings. When this was his obligation why then should the first defendant compromise with the purchaser? By such a compromise the true market value of the property at the time of sale cannot be said to have been secured. The value was reduced by this deduction. And since this was brought about by the act of the first defendant, the first defendant has breached its duty of care to the plaintiffs.

Whether damages claim by the plaintiffs can be sustained

In suit GS 22–58–1992 the plaintiffs had quantified its damages at RM386,631.80. For suit GS 22–86–1995, there is only a claim for the

balance of the proceeds of sale of the said property and for general damages. Since there is this difference in the prayers of these two suits I shall have to deal with them separately. A

In suit GS 22–58–1992, the first item in the particulars of damages is for the loss of RM102,010. According to the plaintiffs this was caused by the failure of the first defendant to forfeit the 10% of the deposit paid by the purchaser. B

I find this claim completely devoid of any merit. The plaintiffs cannot on one hand accept the agreement of sale of the said property as subsisting and then simultaneously insist on being paid damages for termination of the contract due to the purchaser's breach. A claim for this, which is equivalent to the deposit, can only arise when the agreement for sale is terminated. But the plaintiffs have no wish for this. They do not want to set aside the sale. So with this contract of sale subsisting I cannot find any justification to award this amount so claimed. C

On similar ground as above, item 2 in the particulars of damage, which is a claim for loss of interest on the balance of the purchase price of RM918,090, must also be disallowed. D

For the third item, the loss of sum of RM157,610.41 not collected from the purchaser and interest accruing thereto, I find for the plaintiffs. This amount was part of the balance of the purchase price that was unlawfully set-off. The first defendant owes a duty of care to the plaintiffs to secure the true market value of the property at the date of sale. Since this sum if paid by purchaser would represent the true market value at the time of sale, I find that the plaintiffs should be compensated with it. E

The next item in the particulars of damage is the claim for interest charged by the first defendant on the plaintiffs account for the outstanding sum due on the judgment debt pronounced in favour of the first defendant in the order of sale of the said property from the date of the sale to the date of completion of sale. I find the plaintiffs are not entitled to this. The order of sale pronounced that the first defendant was entitled to charge such interest until the full settlement of the judgment sum. When the first defendant was legally entitled to charge such interest, I cannot comprehend the logic of why they should be ordered to return this to the plaintiffs. F G

The last item in the particulars of damages is for loss of interest suffered by the plaintiffs in having to pay Public Bank Bhd for facilities given to another account of the plaintiffs. This claim is far too remote for consideration and therefore does not justify me in granting. H

The reason why suit GS 22–86–1995 was filed later than GS 22–58–1992 had been explained in the earlier part of this judgment. In respect of this suit no evidence was led by the plaintiff. I believe that this plaintiff relied his case solely on the evidence presented in GS 22–58–1992. For this, I am of the view that the amount of damages to be ordered in this case must be the plaintiff's entitlement to the award handed down in the case GS 22–58–1992 since the deceased of the estate was a co-owner of the said property that was sold by judicial sale. This plaintiff's claim for damages cannot be I

more than what the deceased was entitled to from the benefits of the said property.

Conclusion

Accordingly, I hereby allow:

(1) Judgment for the plaintiffs in suit GS 22–58–1992 against the first defendant for a sum of RM157,510.41 with interest due thereto from 8 July 1989 to 29 February 1992 at the rate of 11% pa.

(2) Interest on the judgment sum at 8% pa from date of judgment to date of realisation.

(3) In suit GS 22–86–1995 the plaintiff shall only be entitled to his share of the judgment sum and interest as awarded in GS 22–58–1992 according to the deceased estate entitlement in the said property.

(4) The claim against the second defendant be dismissed in both the cases with no order as to cost.

(5) There shall be cost against the first defendant in both suits.

Order accordingly.

Reported by Jafisah Jaafar